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In The
Supreme Court of the United States
October Term, 1990

New Orleans Public Service, Inc.,
Petitioner
v.
The Council of the City of New Orleans, et al.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities	ii
Interest of the National Association of State Utility Consumer Advocates	1
Summary of Argument	2
Argument	3
Overview of the Delineation Between Federal and State Authority Over Electric Utilities	4
By Applying the Relevant Legal Principles to the Case At Bar, this Court Should Affirm the Decision of the Fifth Circuit	17
Conclusion	25

TABLE OF AUTHORITIES

Cases

Appalachian Power Co. v. Public Service Commission, 812 F.2d 898 (4th Cir. 1987) — 3, 15

Appeal of Sinclair Machine Products, 126 N.H. 822, 498 A.2d 696 (1985) — 5

Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983) — 23

Commonwealth Electric Co. v. Department of Public Utilities, 397 Mass. 361, 491 N.E.2d 1035 (1986) — 3, 5

Gulf States Utilities Co. v. Alabama Power Co., 824 F.2d 1465 (5th Cir. 1987) — 5

Kansas Gas and Electric Co. v. State Corporation Commission, Docket No. 64976 (Kan. App. June 29, 1990), *review denied*, 794 P.2d 1177 (Kan. 1990), *cert. denied*, --- U.S. ---, 111 S.Ct. 2824 (1991) — 3

Kansas-Nebraska Natural Gas Co. v. State Corporation Commission, 4 Kan. App.2d 674, 610 P.2d 121 (1980) — 5

Kentucky West Virginia Gas Co. v. Pa. Public Utility Commission, 837 F.2d 600 (3d Cir. 1988), *cert. denied*, 488 U.S. 941 (1988) — 3, 5

Maine Public Utilities Commission v. Maine Yankee Atomic Power Co., 581 A.2d 799 (Me. 1990), *cert. denied*, --- U.S. ---, 111 S.Ct. 2851 (1991) — 3

Mississippi Power and Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) — *passim*

Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953 (1986) — *passim*

New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350 (1989) — 21

Pennsylvania Power Co. v. Pennsylvania Public Utility Commission, 127 Pa. Commw. 97, 561 A.2d 43, *aff'd per curiam*, --- Pa. ---, 587 A.2d 312 (1991), *petition for cert. pending* at Docket No. 90-1929 — 3

Pike County Light and Power Co. v. Pa. Public Utility Commission, 77 Pa. Commw. 268, 465 A.2d 735 (1983) — *passim*

Public Utilities Commission v. Attleboro Steam and Electric Co., 273 U.S. 83 (1927) — 22

Spence v. Smyth,
686 P.2d 597 (Wyo. 1984) 5

Administrative Decisions

AEP Generating Co.,
29 FERC ¶ 61,002 (1984) 13

AEP Generating Co.,
29 FERC ¶ 61,246 (1984) 13

AEP Generating Co.,
32 FERC ¶ 61,364 (1985) 13

AEP Generating Co.,
36 FERC ¶ 61,226 (1986) 13

AEP Generating Co.,
38 FERC ¶ 61,243 (1987), *rehearing denied*, 39 FERC ¶ 61,158 (1987) 14

Boston Edison Co.,
55 FERC ¶ 61,382 (1991) 9, 17

Commonwealth Atlantic Limited Partnership, 51 FERC ¶ 61,368 (1990) 9, 17

Doswell Limited Partnership,
50 FERC ¶ 61,251 (1990) 9, 16

Iroquois Gas Transmission System Limited Partnership, 52 FERC ¶ 61,091 (1990) 9, 17

Kentucky Power Co.,
36 FERC ¶ 61,227 (1986) 14

Monongahela Power Co.,
39 FERC ¶ 61,350 (1987) 8, 9, 15

Pacific Power and Light Co.,
27 FERC ¶ 61,080 (1984) 9, 24

Pennsylvania Power and Light Co.,
23 FERC ¶ 61,006 (1983) 9

Philadelphia Electric Co.,
15 FERC ¶ 61,264 (1981) *passim*

Southern Company Services, Inc.,
20 FERC ¶ 61,332 (1982) 9, 24

Southern Company Services, Inc.,
26 FERC ¶ 61,360 (1984) 9, 24

Southern Company Services, Inc.,
28 FERC ¶ 61,349 (1984) 9

Statutes, Regulations & Rules

16 U.S.C. § 824 22

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Interest of the National Association of State Utility Consumer Advocates

The National Association of State Utility Consumer Advocates (NASUCA) files this brief as *amicus curiae* in support of Respondents. NASUCA members are the state-designated representatives of the interests of utility consumers in proceedings before state and Federal utility commissions. More particularly, NASUCA members represent retail electric consumers in 38 states and the District of Columbia.

NASUCA files this brief to urge the Court to affirm the decision of the United States Court of Appeals for the Fifth Circuit and to clarify the authority of state regulators to establish the intrastate rates of retail electric utilities. NASUCA submits this brief with the consent of the parties, and has filed written verification of such with the Clerk pursuant to Supreme Court Rule 37.3.

Summary of Argument

For over a decade, the Federal Energy Regulatory Commission (FERC) has held that, when it sets rates for a power transaction, it does not have the jurisdiction to determine the prudence of either the seller or the buyer in entering into the transaction. Rather, the prudence of the utilities' actions is examined by state regulators when retail rates are set for the utilities. FERC and this Court have recognized a limited exception to this rule when *both* the buyer and the seller are affiliates and are engaged in an integrated power pool. These principles are consistent with a long line of Federal and state cases and are well-grounded in the Federal Power Act. This Court should specifically adopt these principles.

In this case, however, New Orleans Public Service, Inc. (NOPSI) urges the Court to disregard these principles. NOPSI argues that state jurisdiction does not extend to transactions which involve unaffiliated, unpooled companies just because *one* of the parties is a member of an integrated pool of affiliates. This proposed limitation on state jurisdiction is contrary to FERC's consistent practice over the past decade. Moreover, it would have

serious consequences for the regulation of the electric utility industry. In particular, it would prohibit state regulators from determining the prudence of the particular mix of power resources used to meet a utility's *retail* requirements. Consequently, such matters would be required to be addressed by FERC. Neither FERC nor any court has held that FERC has such jurisdiction. Yet, this is the logical consequence of the arguments advanced by NOPSI before this Court. NASUCA submits, therefore, that this Court must reject these arguments and affirm the decision below of the Fifth Circuit.

Argument

In recent years, the state and Federal courts, and indeed this Honorable Court, have been increasingly called upon to determine the scope of Federal and state authority over the operations of retail electric and natural gas utilities.[1] NASUCA respectfully submits that this Court

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1 *See, e.g., Commonwealth Electric Co. v. Department of Public Utilities*, 397 Mass. 361, 491 N.E.2d 1035 (1986); *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Appalachian Power Co. v. Public Service Commission*, 812 F.2d 898 (4th Cir. 1987); *Kentucky West Virginia Gas Co. v. Pa. Public Utility Commission*, 837 F.2d 600 (3d Cir. 1988), *cert. denied*, 488 U.S. 941 (1988); *Mississippi Power and Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988); *Pennsylvania Power Co. v. Pennsylvania Public Utility Commission*, 127 Pa. Commw. 97, 561 A.2d 43, *aff'd per curiam*, --- Pa. ---, 587 A.2d 312 (1991), *petition for cert. pending at* Docket No. 90-1929; *Kansas Gas and Electric Co. v. State Corporation Commission*, Docket No. 64976 (Kan. App. June 29, 1990), *review denied*, 794 P.2d 1177 (Kan. 1990), *cert. denied*, --- U.S. ---, 111 S.Ct. 2824 (1991); *Maine Public Utilities Commission v. Maine Yankee Atomic Power Co.*, 581 A.2d 799 (Me. 1990), *cert. denied*, --- U.S. ---, 111 S.Ct. 2851 (1991).

should affirm the rights of states to regulate retail utility rates. Further, this Court should make it clear that the Federal Energy Regulatory Commission (FERC) does not regulate the prudence of utilities' wholesale purchasing and selling decisions, except in very limited instances. This case presents an opportunity for this Court to clarify the limitations on the jurisdiction of FERC.

Overview of the Delineation Between Federal and State Authority Over Electric Utilities

The briefs filed by NOPSI and the Solicitor (for the United States and FERC, cited herein as "FERC Brief") suggest that the relevant legal principles can be determined just by examining this Court's decision in *Mississippi Power and Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). NASUCA respectfully submits that this is not correct. In order to fully understand the limitations on FERC's jurisdiction, it is necessary to place the *Mississippi Power* decision in the context of more than a decade of decisions from FERC and various Federal and state courts. As NASUCA discusses below, FERC itself has consistently recognized the limits on its jurisdiction since at least 1981. FERC's argument to this Court, however, represents a significant departure from the principles adopted by the courts and by FERC itself in its written decisions.

The overall delineation between Federal and state authority over the electric industry was perhaps best articulated by the Commonwealth Court of Pennsylvania in *Pike County Light and Power Co. v. Pa. Public Utility Commission*, 77 Pa. Commw. 268, 465 A.2d 735 (1983).

Since then, the principle enunciated in that case has been widely referred to as the "*Pike County* doctrine." Simply, in *Pike County*, the Pennsylvania court held that the state utility commission had jurisdiction to determine the reasonableness and prudence of a utility's wholesale purchasing decisions. The role of FERC was to determine the rate which the wholesale seller could charge. FERC, however, did not examine the wisdom of the buyer's decision; only the reasonableness of the rate which the seller could charge.

This delineation between Federal and state authority has been followed by several Federal and state courts[2] and by FERC itself. Indeed, even prior to the *Pike County* case, FERC had applied this same principle. In *Philadelphia Electric Co.*, 15 FERC ¶ 61,264 (1981), FERC held that its approval of a wholesale rate did not mean that the buyer was acting prudently in making the purchase. *Id.*, at 61,601. Moreover, in that case FERC also held that approval of the rate did not mean that the seller was acting prudently in making the sale. FERC thus recognized that its jurisdiction was limited to determining the

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2 *See, e.g., Appeal of Sinclair Machine Products*, 126 N.H. 822, 498 A.2d 696 (1985); *Commonwealth Electric Co. v. Department of Public Utilities*, 397 Mass. 361, 491 N.E.2d 1035 (1986); *Spence v. Smyth*, 686 P.2d 597 (Wyo. 1984); *Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 4 Kan. App.2d 674, 610 P.2d 121 (1980); *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987); *Kentucky West Virginia Gas Co. v. Pa. Public Utility Commission*, 837 F.2d 600 (3d Cir. 1988), *cert. denied*, 488 U.S. 941 (1988).

reasonableness of the rate (and other terms and conditions) of the wholesale transaction. Its jurisdiction did not encompass an examination of the wisdom of either party in entering into that particular transaction (as opposed to the other options which might be available to them).

NASUCA recognizes, as did the Fifth Circuit, that the case at bar is not a classic "*Pike County*" case. That is, the dispute here is not over a wholesale purchasing decision made by a utility. FERC, however, has long recognized that the same principles on which the *Pike County* doctrine is based apply to FERC's jurisdiction over sellers of power. Further, these principles play an important role in understanding the delineation between Federal and state authority over the electric utility industry. Thus, these principles provide an important foundation from which to view this case.

In particular, the *Pike County* doctrine, as FERC and the courts have recognized, is necessary for the proper functioning of the regulatory process. FERC's role is to determine whether the price, and other terms and conditions, at which power is moving in interstate commerce are "just and reasonable." However, it is not the role of FERC to determine whether all of the potential buyers and sellers are making wise decisions given all of the options which are available to them.

For example, a utility may have several options to meet its need for power. It might be able to generate the power itself, use demand-management techniques to reduce the need for power, purchase power from several utilities, or purchase power from non-utility generators. Each of the potential sources of power will have different costs and will

be available under different terms and conditions. FERC must approve the reasonableness of the rates and terms only of the sales by other utilities. However, FERC cannot possibly examine all of the purchaser's supply and demand-related options and determine whether it has made a wise choice to satisfy its need for retail power in a particular way or from a particular source. That decision must be made by the state regulatory commissions in setting retail rates for the utility.

Similarly, as FERC held in *Philadelphia Electric*, it does not examine the reasonableness or prudence of the decision made by the seller. The selling utility also may have many options available to it (selling to various other utilities for varying lengths of time; using the power to serve retail load at lower cost; retiring older capacity; etc.). Thus, FERC appropriately has held that it is the role of the state commissions -- not FERC -- to assess whether the selling utility made a reasonable decision when it chose to make a particular sale.

The *Pike County* decision recognizes this distinction. There, the Pennsylvania court discussed the jurisdictional line between an examination of the costs of the seller (Orange & Rockland) versus the retail ratemaking treatment of the costs incurred by the buyer (Pike). The *Pike County* court thus held:

> The FERC focuses on Orange & Rockland to determine whether it is just and reasonable *for that company to charge* a particular rate, but makes no determination of whether it is just and reasonable *for Pike to incur* such a rate as an expense. The PUC, on the other hand, has no jurisdiction to analyze Orange & Rockland's

cost of service data and makes no determination as to the reasonableness for Orange & Rockland to charge its rates. The PUC focuses on Pike and its cost of service data to determine whether it is reasonable for Pike to incur such costs in light of available alternatives. So while the FERC determines whether it is against the public interest for Orange & Rockland to charge a particular rate in light of its costs, the PUC determines whether it is against the public interest for Pike to pay a particular price in light of its alternatives. The regulatory functions of the FERC and the PUC thus do not overlap, and there is nothing in the federal legislation which preempts the PUC's authority to determine the reasonableness of a utility company's claimed expenses. In fact, we read the Federal Power Act to expressly preserve that important state authority.

Id., 77 Pa. Commw. at 274-75, 465 A.2d at 738 (emphasis in original; footnote omitted).

The essence of the *Pike County* doctrine, then, is that if a utility has a choice when engaging in a wholesale transaction, the state commissions have jurisdiction to examine the reasonableness and prudence of the choices which the utility made. In particular, the states' power arises when the utility attempts to have *retail* rates set which reflect the effects of the wholesale transaction. (It should be noted that FERC has similar authority when the utility attempts to have *wholesale* rates set which reflect the effects of other wholesale transactions. *See Monongahela Power Co.*, 39 FERC ¶ 61,350, 62,095 (1987).)

FERC has consistently followed this reasoning over the decade which has passed since its *Philadelphia Electric* decision.[3] However, over the years, FERC and the courts (including this Court) recognized a corollary to the *Pike County* doctrine: When the utility has no choice in making a wholesale transaction, the *Pike County* doctrine does not apply (or, perhaps more accurately, the *Pike County* inquiry is not meaningful).

The prototypical example of a utility without a purchasing choice is one which is affiliated with a group of utilities that operate as an integrated power pool, and which FERC has ordered to make a particular purchase within the affiliated pool. This is precisely the issue which this Court decided in *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986). There, the Court held that since FERC specifically ordered the utility to purchase only a certain amount of low-cost power, the utility had no choice but to pay for that amount of power and no more. The state commission was powerless to find that the utility had the option of purchasing more power than FERC had ordered it to purchase.

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3 *See, e.g., Southern Company Services, Inc.*, 20 FERC ¶ 61,332 (1982); *Pennsylvania Power and Light Co.*, 23 FERC ¶ 61,006 (1983); *Southern Company Services, Inc.*, 26 FERC ¶ 61,360 (1984); *Pacific Power and Light Co.*, 27 FERC ¶ 61,080 (1984); *Southern Company Services, Inc.*, 28 FERC ¶ 61,349 (1984); *Monongahela Power Co.*, 39 FERC ¶ 61,350 (1987); *Doswell Limited Partnership*, 50 FERC ¶ 61,251 (1990); *Commonwealth Atlantic Limited Partnership*, 51 FERC ¶ 61,368 (1990); *Iroquois Gas Transmission System Limited Partnership*, 52 FERC ¶ 61,091 (1990); *Boston Edison Co.*, 55 FERC ¶ 61,382 (1991).

Similarly, in *Mississippi Power and Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), the Court held that a FERC order directing a utility to purchase a certain amount of high-cost power likewise prevented a state commission from finding that the utility had a choice not to purchase that power. In those cases, the Court clearly established the corollary to *Pike County*: Where FERC has ordered a utility to engage in a certain transaction, there is no choice and, thus, no meaningful *Pike County* review at the state level.

The import of *Mississippi Power*, though, is not that it establishes the *Nantahala* rule for high-cost power as well as for low-cost power. Rather, the significant question in *Mississippi Power* was a jurisdictional one: When does FERC have the jurisdiction under the Federal Power Act to order a utility to engage in a wholesale transaction? This jurisdictional question was addressed in some detail in Justice Scalia's concurring opinion and Justice Brennan's dissenting opinion (in which Justices Marshall and Blackmun joined).

Mississippi Power made it clear that FERC's jurisdiction over wholesale purchasers was extremely limited. *Mississippi Power* did not abolish the *Pike County* doctrine. Indeed, *Mississippi Power* did not really affect the *Pike County* doctrine itself. Rather, that case called on the Court to determine when FERC has jurisdiction to order a purchaser to make a particular purchase. The Court held that in the limited situation where the purchaser was a corporate affiliate of the seller and the parties were engaged in an integrated power pool, FERC had jurisdiction over the purchaser (and, thus, could order the purchaser to purchase a particular quantity of power). As Justice Scalia stated in his concurring opinion:

> After today, the battle will no longer be over who has jurisdiction, FERC or the States, to evaluate the prudence of a particular utility's *entering pooling arrangements with affiliated companies* for the sharing of electric generating capacity or the creation and wholesaling of electrical energy. FERC has asserted that jurisdiction and has been vindicated.

Mississippi Power, 487 U.S. at 383 (emphasis added).

Importantly, all of the Justices in *Mississippi Power* appeared to agree about the general applicability of the *Pike County* doctrine. Thus, the dissent began by citing *Pike County* and *Nantahala* for the general limits on FERC's jurisdiction, stating:

> FERC does not, however, have jurisdiction to determine whether it might be imprudent, given other purchasing options, for a retailing utility to *purchase* power at the FERC-approved wholesale rate. The state utility commissions have jurisdiction to determine, for example, that the retail utility does not need the power or could obtain power from other sources at a lower cost. Thus, although a state utility commission cannot decide that a retail utility should have bought wholesale power from a given source at other than the FERC-approved wholesale rate, it can decide that the utility should not have bought power from that source at all. In short, the reasonableness of charging a rate as a wholesaler is distinct from the reasonableness of incurring that charge as a purchaser.

Id., 487 U.S. at 385 (citations omitted; emphasis in original).

Where the dissent and majority differed was in their interpretation of the Federal Power Act to allow an exception to this general principle for affiliated power pools. The presence of an affiliated power pool raised two serious concerns. First, since the companies were affiliates, the transactions were not at arms' length, thereby possibly requiring review by a Federal intermediary. Second, the existence of an integrated power pool blurred the normal distinction between buyer and seller. Justice Brennan described this problem as follows:

> Interstate electricity pools, however, present special difficulties for the wholesale/retail division of jurisdiction because the "wholesale" transaction is from the pool to the utilities belonging to the pool, and thus the entities wholesaling the power are the same ones purchasing and retailing the power.

Id., at 386.

This distinction becomes important because FERC's jurisdiction is limited to matters affecting wholesale *rates*. In a normal transaction (between non-affiliated parties who are not engaged in an integrated power pool), the mere purchase of power does not affect the wholesale *rate* for power. However, when the transaction is not at arms' length and the parties are pooled (such that today's buyer might become tomorrow's seller and *vice versa*), the purchase does have a direct effect on the wholesale rate for power. This distinction was sufficient for a majority of the Court to agree with FERC that, under these limited facts, FERC has jurisdiction over the purchaser of power.

Indeed, what Justice Scalia appeared to find most persuasive was FERC's decision in another series of cases.

See id. at 378-79. While *Mississippi Power* had been working its way through the lower courts, FERC had issued a series of opinions in cases involving affiliates of the American Electric Power (or AEP) system. In those cases, FERC set forth a reasoned basis for its assertion of jurisdiction over wholesale purchasers where the buyer and seller were affiliates involved in an integrated power pool. FERC's reasoned decisions in those cases, however, stand in stark contrast to its wholly unsupported and unprecedented assertion of jurisdiction in its Brief to this Court. *See* pages 20 to 24, *infra*.

Initially, FERC had held that it would not consider the prudence of the purchasing members of AEP when setting rates for the selling member of AEP. *AEP Generating Co.*, 29 FERC ¶ 61,002 (1984); *AEP Generating Co.*, 29 FERC ¶ 61,246 (1984); *AEP Generating Co.*, 32 FERC ¶ 61,364 (1985). However, FERC subsequently concluded that the affiliated relationship of the parties and their integrated pooling arrangement had a direct effect on the reasonableness of the wholesale rates to be charged.

In *AEP Generating Co.*, 36 FERC ¶ 61,226 (1986), FERC began with a reaffirmation of the general principle that it does not have jurisdiction to examine the reasonableness or prudence of the purchaser's purchasing decision when setting rates for the seller, noting that "[u]nder narrow, non-pool circumstances, that view would remain sufficient and dispositive." *Id.*, at 61,550. FERC then explained, as follows, that the existence of an affiliated, integrated power pool presented a different jurisdictional question:

> [W]here, as here, the transaction involves affiliated, jurisdictional utilities, which are members of an integrated, interstate holding company arrangement, performing diverse functions on a coordinated basis, and particularly where differing interpretations are advocated concerning the parties' rights and obligations under the basic system agreements, the relevant issues may not be so readily segregated. Under these circumstances, more complex, interrelated questions arise and, whether one characterizes the questions as related to prudence, interpretation, or cost allocation, they are clearly matters most appropriately resolved by this Commission as part of its overriding authority to evaluate and implement all applicable wholesale rate schedules.

Id. FERC made similar statements in a companion order issued for another of the AEP companies the same day, *Kentucky Power Co.*, 36 FERC ¶ 61,227 (1986). *See also AEP Generating Co.*, 38 FERC ¶ 61,243 (1987), *rehearing denied*, 39 FERC ¶ 61,158 (1987).

In rejecting an attempt by the Kentucky Public Service Commission to alter provisions of the FERC-approved AEP agreements, the U.S. Court of Appeals for the Fourth Circuit described as follows the critical jurisdictional distinction that enabled FERC to regulate purchasers in an integrated pool of affiliated companies:

> Another reason the distinction *Pike County* drew between state and federal inquiries does not exist here is that, unlike the wholesale

> agreement at issue in *Pike County*, the [pooling agreement among the AEP companies] has no distinct "buyer" and "seller" of energy. *Pike County* had emphasized that FERC considers interstate agreements from the seller's perspective, while state commissions focus upon the in-state buyer. The nature of the [pooling agreement] and the AEP system is such that an affiliated utility could be at one time a receiver or "buyer" and at another time a supplier or "seller" of energy. FERC thus necessarily considered the fairness of the agreement from the perspective of all involved parties.

Appalachian Power Co. v. Public Service Commission, 812 F.2d 898, 904 (4th Cir. 1987).

In short, this Court's decision in *Mississippi Power*, as well as FERC's explication of its jurisdiction in the *AEP* cases, establish the limited jurisdiction of FERC over wholesale purchasers. FERC has such jurisdiction only where the purchaser is affiliated with the seller and they are members of an integrated power pool.

FERC has continued to recognize the validity of the *Pike County* doctrine (and the corresponding limits of its jurisdiction) after *Mississippi Power* and *AEP*. Initially, just one month after its final *AEP* order was issued, FERC issued an order which made it clear that *AEP* did not change the general rule (which is fully consistent with *Pike County*). In *Monongahela Power Co.*, 39 FERC ¶ 61,350 (1987), FERC was again faced, in the context of the seller's rate case, with a challenge to the prudence of a purchaser.

FERC declined to rule on the prudence of the purchaser, holding that because the purchaser and seller were not affiliates and were not members of an integrated power pool, "*we do not have jurisdiction* in this proceeding over the question of whether PEPCO [the purchaser] was prudent in entering into this transaction." *Id.*, at 62,095 (emphasis added).

Thus, immediately after its *AEP* decision, FERC made it absolutely clear that in the case of a transaction between unaffiliated companies, it did not have the jurisdiction to consider the prudence of the purchaser when setting the rate for the seller.

Recently, FERC has considered the effect of this Court's decisions in *Nantahala* and *Mississippi Power* and reached the same conclusion. Specifically, in *Doswell Limited Partnership*, 50 FERC ¶ 61,251 (1990), FERC held:

> Our finding that Doswell's rate is "just and reasonable" in this filing does not preclude this Commission or the Virginia Commission from examining the prudence of Virginia Power's purchase in a subsequent rate case. The Commission reaffirms its conclusion that the Supreme Court's decisions in *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986), or subsequent cases, do not preclude state regulators from reviewing the prudence of a utility's purchasing decisions. While *Nantahala* held that "a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable," 476 U.S. at 966, the Court did not decide the issue whether a state agency can inquire into a utility's prudence in choosing to pay the FERC-approved wholesale rate of another supplier. *See also Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n*, 837 F.2d 600 (3rd Cir.), *cert. denied*, 109 S.Ct. 365 (1988); *Pike County Light and Power Co. v. Pennsylvania Public Utility Comm'n*, 465 A.2d 735, 737-738 (1983).

Doswell, at 61,758-59 n.18. *Accord Commonwealth Atlantic Limited Partnership*, 51 FERC ¶ 61,368, 62,249 n.84 (1990); *Iroquois Gas Transmission System Limited Partnership*, 52 FERC ¶ 61,091, 61,359 n.63 (1990); *Boston Edison Co.*, 55 FERC ¶ 61,382, 62,168 n.61 (1991).

NASUCA respectfully submits that this Court should specifically adopt the *Pike County* doctrine and its underlying principles. These principles then should be applied to the facts of this case to affirm the Fifth Circuit's decision.

By Applying the Relevant Legal Principles to the Case At Bar, this Court Should Affirm the Decision of the Fifth Circuit.

The case at bar raises a subsidiary question to that which the Court considered in *Mississippi Power*. *Mississippi Power* established that FERC has jurisdiction over members of an integrated pool of affiliated companies. Here, the Court is being asked to determine the *limits* on FERC's jurisdiction over affiliated members of an integrated power pool. This issue was not addressed by the Court in either *Nantahala* or *Mississippi Power*. The

Petitioner, as well as FERC and the other *amici curiae* supporting the Petitioner, seem to argue that FERC has plenary jurisdiction over members of such a pool. Thus, they have asked this Court to prevent a state regulatory commission (for that is the role which the City Council has *vis-a-vis* NOPSI under Louisiana law; *see* J.A. 15) from asserting jurisdiction over an important aspect of the retail rates of a utility solely because the utility is a member of an integrated power pool of affiliated companies.

There is no question, after *Mississippi Power*, that the City Council could not find that NOPSI had a choice in purchasing power from Grand Gulf. FERC had the jurisdiction to require NOPSI to purchase a specific portion of that plant and the state regulators cannot find that NOPSI had a choice in making that purchase. However, that is not what the City Council did here.

In this case, the City Council engaged in a very different inquiry. The City Council did *not* attempt to disturb the rate which NOPSI paid for power and did *not* attempt to alter the FERC-ordered allocation of power. Rather, it asked: What should NOPSI have done with this power? There is nothing in FERC's orders which says that NOPSI must use this power to serve its retail customers. There is nothing in FERC's orders which says that NOPSI was prohibited from selling the power from Grand Gulf at wholesale rather than at retail. So, the City Council engaged in an inquiry into the reasonableness and prudence of NOPSI's decision to use all of this power to serve its retail customers, rather than attempting to sell it to other (unaffiliated) utilities.

Based on substantial record evidence, the City Council found that NOPSI had the opportunity to sell a portion of this power to other utilities and that it imprudently failed to do so. The issue before this Court is whether this was a lawful exercise of the state's legal authority. Conversely, the question could be asked: Does FERC have the jurisdiction to determine whether it would be reasonable and prudent for NOPSI to sell power to another, unaffiliated utility? NASUCA submits that the answer to the latter question must be no. FERC has held for over a decade that it does not have the jurisdiction to examine the prudence of a seller's decision to sell to an unaffiliated, unpooled utility.

This case presents the flip-side of the question presented to FERC in *Philadelphia Electric*. There, the Pennsylvania Office of Consumer Advocate questioned the reasonableness and prudence of the selling utility's decision to sell a certain quantity of power to an unaffiliated utility at the rate being filed with FERC. FERC rejected this challenge, holding that it was a matter for the state utility commission to resolve when setting retail rates for the utility. FERC thus held:

> [W]e wish to make it clear that our decision to accept the contract for the initial period does not, in our view, bind us or the Pennsylvania Public Utility Commission to any particular treatment of these items in the cost of service for wholesale and retail requirements customers of PE [the selling utility].
>
> Further, our decision to accept the contract rate and service arrangement is not predicated on a determination that, over the initial term of the contract, PE could have done no better selling to someone else ... [W]e do not

> mean by this order to prejudge, for our own purposes or those of the respective state commissions, a determination of the prudence of either party in entering into this transaction.

Philadelphia Electric Co., 15 FERC, at 61,601. Thus, for the past decade, FERC has held that it would not consider the prudence of a seller's decision when setting rates for that sale.

FERC's decision in *AEP* and this Court's decision in *Mississippi Power* did not change this. FERC and this Court have made it clear that those decisions are limited to transactions among affiliated companies which are engaged in an integrated power pool. Indeed, as noted above, FERC has specifically stated that it will continue to rely on the *Pike County* doctrine in cases where the transaction is not between pooled affiliates. *See, e.g., Monongahela Power Co., supra; Doswell Limited Partnership, supra.*

The brief of FERC in the case at bar recognizes this limitation on its jurisdiction. Thus, for example, FERC describes its jurisdiction "over wholesale transactions among members of an integrated public utility holding company system." FERC Brief at 11. This is an accurate statement of FERC's jurisdiction. Yet, FERC and NOPSI attempt to expand this authority into jurisdiction over transactions which are not "among members of an integrated public utility holding company system." It is particularly difficult to reconcile FERC's position given its acknowledgment that NOPSI has "some measure of individual autonomy" over its operations. *Id.* at 17, n.7. If NOPSI has the right to operate autonomously (that is, it is not restricted to only dealing with its affiliates), then how can FERC assert that it has jurisdiction over non-affiliated aspects of NOPSI's operations?

As stated by the Court in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989):

> The Council has not sought directly to regulate interstate wholesale rates; nor has it questioned the validity of the FERC-prescribed allocation of power within the Grand Gulf system, or the FERC-prescribed wholesale rates; nor has it reexamined the prudence of NOPSI's agreement to participate in Grand Gulf 1 in the first place. Rather, the Council maintains that it has examined the prudence of NOPSI's failure, after the risks of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the normal ratemaking step of making NOPSI's shareholders rather than the ratepayers bear the consequences. *Nothing in this is directly or even indirectly foreclosed by the federal statute, the regulations implementing it, or the case law applying it.*

Id., at 367 (emphasis added).

Thus, this Court cannot sustain the position of NOPSI and FERC that FERC alone has jurisdiction to determine whether a utility should have sold power to an unaffiliated, unpooled utility. This position is directly contrary to FERC's consistent practice over the past decade. If FERC lacks jurisdiction to consider the prudence of sales to unaffiliated companies, then surely it also must lack jurisdiction to consider the prudence of the *failure* to sell to unaffiliated companies.

The fact that *one* of the utilities to the transaction is a member of an integrated power pool of affiliates is not sufficient for FERC to have jurisdiction. FERC's jurisdiction exists only when *both* parties to the transaction are affiliated with each other and are *both* members of the same integrated power pool. Otherwise, the mere entry into a minor pooling arrangement with an affiliate would automatically exempt all of the utility's wholesale decisions from state review.

For example, a utility with a retail demand of 5000 megawatts could enter into a pooling arrangement with a small affiliate for 100 megawatts. FERC would have ordered the utility to buy 100 megawatts of power from its small affiliate. Would this then exempt the remaining 4900 megawatts of power from review at the retail rate level? If this question were answered in the affirmative, then FERC would have to exercise jurisdiction over the entirety of the utility's operations -- a matter over which FERC and numerous courts have held that FERC does not have jurisdiction.

Further, it must be recalled that the very purpose of the Federal Power Act was to eliminate the "regulatory gap" which had developed as a result of the Court's decision in *Public Utilities Commission v. Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927). This "regulatory gap" had allowed certain power transactions to remain unregulated by either the states or the Federal government. Congress expressed a clear intention to close that gap. The Federal Power Act gives certain, specifically defined, powers to the Federal government and leaves all other matters to the states. *See* 16 U.S.C. § 824. This Court has since made it clear that it would not sanction an

interpretation of the Federal Power Act which would allow a power transaction to be unregulated. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983).

Yet, NOPSI's contention before this Court would create just such a gap in the regulation of power sales. NOPSI asserts that just because it is a member of a pool of affiliated companies, then all of its wholesale activities -- whether with its affiliates or with others -- are exempt from review at the retail level. This cannot be sanctioned by this Court, particularly since FERC itself has held that it does not have the jurisdiction to review transactions between unaffiliated, unpooled companies.

Thus, the relief requested by NOPSI would have one of two effects. Either it would give FERC jurisdiction over the prudence of all wholesale buyers and sellers (without regard to their affiliation or pooling arrangements), or it would create a "regulatory gap" in which certain transactions would not be regulated by either the state or Federal commissions. NASUCA submits that neither result is in the public interest or consistent with the Federal Power Act.

Moreover, FERC's reference to previous cases where it has considered the prudence of utilities' off-system sales decisions does not lead to a different conclusion. FERC Brief at 18 n.9. The cases cited by FERC were cases where it was setting *general wholesale rates for the selling utility*. In setting those rates, FERC necessarily had to determine whether or not the utility had acted reasonably and prudently in procuring the power which it would be selling at wholesale. These cases did *not* involve affiliated pooling arrangements, power allocations, or other *specific* power transactions. They are simple rate cases.

Indeed, it is instructive to note that FERC has drawn a clear distinction between the scope of its jurisdiction when setting general wholesale rates and its jurisdiction over particular power transactions. For example, in the *Monongahela Power* case FERC expressly stated that it did not have jurisdiction over the purchaser *when setting rates for the seller*. However, if the purchaser attempted to pass those costs on through *its wholesale rates*, then FERC would have jurisdiction over the prudence of the utility's purchasing decisions. Specifically, FERC held:

> [W]e do not have jurisdiction in this proceeding over the question of whether PEPCO was prudent in entering into this transaction. We may consider that question only in a rate proceeding in which PEPCO seeks to pass through the costs of the ... purchase to wholesale ratepayers.

Id., 39 FERC at 62,095. *Accord Southern Company Services, Inc.*, 20 FERC ¶ 61,332 (1982); *Southern Company Services, Inc.*, 26 FERC ¶ 61,360 (1984); *Pacific Power and Light Co.*, 27 FERC ¶ 61,080 (1984).

Thus, the cases cited by FERC do not support its assertion of jurisdiction in this case.

In summary, NASUCA respectfully requests this Court to affirm the right of state utility commissions to regulate the retail rates of electric utilities. This state power must include an examination of all of the power-supply alternatives reasonably available to the retail utility. While FERC has jurisdiction over transactions among affiliates engaged in an integrated power pool, that jurisdiction does not extend to unaffiliated transactions of such pool members. This Court should so hold and should affirm the opinion below by the Fifth Circuit.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit should be affirmed. That decision is fully consistent with decisions of FERC, other Federal and state courts, and this Court, as well as the statutory limits placed on FERC's jurisdiction.

Respectfully submitted,

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